SUPREME COURT OF THE UNITED STATES.

No. ~~220.~~ 136

CORNELIUS F. BUCK, PLAINTIFF IN ERROR,

vs.

HORACE N. COLBATH.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

GOVERNMENT PRINTING OFFICE.

SUPREME COURT OF THE UNITED STATES.

No. 220.

CORNELIUS F. BUCK, PLAINTIFF IN ERROR,

vs.

HORACE N. COLBATH.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the supreme court of the State of Minnesota, greeting :

Because that in the record and process, and also in the rendering of judgment in a suit before you, between Cornelius F. Buck, plaintiff in error, and Horace N. Colbath, defendant in error, in a civil action, a manifest error has intervened to the great damage of the said plaintiff in error, as in his complaint has been stated, and as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded that if judgment thereof be given, then under your seal you do, distinctly and openly, send the record and process in the suit aforesaid, with all things concerning them, and this writ, so that you have the same before the chief justice and the associate justices of the Supreme Court of the United States on the first Monday of December next, at Washington, being the present seat of the national government, that the record and process aforesaid being inspected they may cause to be done thereupon what of right ought to be done.

2 Witness the Honorable Roger B. Taney, chief justice of the said Supreme Court, this 16th day of March, in the year of our Lord one thousand eight hundred and sixty-three, and of the independence of the United States the eighty-seventh.

H. E. MANN,
Clerk of the Circuit Court of the United States for the District of Minnesota.

Filed March 16th, 1863.

A. McELRATH, *Dep. Clerk.*

3 UNITED STATES OF AMERICA, *ss:*

To Horace N. Colbath, greeting :

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Minnesota, wherein Cornelius F. Buck is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Lafayette Emmett, chief justice of the said supreme court of the State of Minnesota, this 16th day of March, A. D. 1863.

L. EMMETT, *Ch'f Jus. S. C.*

4 Due service of the within citation is hereby admitted on the 23d day of March, A. D. 1863.

D. A. SECOMBE,
Att'y and of counsel for def'ts in error.

Filed March 16th, 1863.

A. McELRATH, *Dep. Clerk.*

5 Supreme court of the State of Minnesota.

Know all men by these presents that we, Cornelius F. Buck, James E. Thompson, and Horace Thompson, are held and firmly bound unto Horace N. Colbath in the sum of five thousand dollars, lawful money of the United States, to be paid to the said Horace N. Colbath, his executors, administrators, or assigns, to which payment, well and truly to be made, we bind our-

selves and each of us, jointly and severally, and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 16th day of March, 1863.

The condition of this obligation is such that whereas the said Horace N. Colbath has recovered a judgment in the supreme court of the State of Minnesota against the said Cornelius F. Buck, affirming a judgment rendered on the 3d day of June, A. D. 1862, in favor of said Horace N. Colbath, and against said Cornelius F. Buck, in the district court of the fourth judicial district, for the county of Anoka, in said State of Minnesota, for the sum of two thousand four hundred and eighty-five 53-100 dollars, which said judgment of affirmance was rendered on the sixth day of March, A. D. 1863, and whereas the said Cornelius F. Buck, in order to obtain a reversal of the same, has sued out a writ of error to the Supreme Court of the United States:

6 Now, therefore, if the above-named Cornelius F. Buck shall prosecute his said writ of error to effect, and shall answer all damages and costs and pay the said judgment if he shall fail to make good his plea, then this obligation shall be void; otherwise, the same shall remain in full force and virtue.

CORNELIUS F. BUCK. [SEAL.]
JAMES E. THOMPSON. [SEAL.]
HORACE THOMPSON. [SEAL.]

Executed and delivered in presence of—
HENRY L. WILLIAMS.

STATE OF MINNESOTA, *Ramsey County, ss:*

On this 16th day of March, A. D. 1863, before me personally appeared Cornelius F. Buck, James E. Thompson, and Horace Thompson, to me well known to be the persons described in and who executed the foregoing bond, and they acknowledge that they executed the same freely and voluntarily for the purposes therein expressed.

[NOTARIAL SEAL.]
HENRY L. WILLIAMS,
Notary Public, Ramsey Co., Min.

7 STATE OF MINNESOTA, *Ramsey County, ss:*

James E. Thompson and Horace Thompson, of said county, being duly sworn, each for himself says that he is a resident and freeholder of said State, and is worth the sum of five thousand dollars over and above all his debts and liabilities which he owes or has incurred, and exclusive of property by law exempt from execution.

JAMES E. THOMPSON.
HORACE THOMPSON.

Sworn to and subscribed before me this 16th day of March, A. D. 1863.
[NOTARIAL SEAL.]
HENRY L. WILLIAMS,
Notary Public, Ramsey Co., Min.

8 *Writ of error.*

UNITED STATES OF AMERICA, *ss:*

Supreme court State of Minnesota.

The State of Minnesota to the Hon. C. E. Vanderburgh, judge of the district court of the fourth judicial district of the said State of Minnesota:

Whereas it has been represented to us that in a certain action lately pending in your court before you, sitting in and for the county of Anoka, in

said district, wherein Horace N. Colbath was plaintiff and Cornelius F. Buck was defendant, error has intervened to the damage, as it is said, of the said defendant, and we being willing that such error, if any there should be, may be corrected, and full and speedy justice done in that behalf, do command you that if final judgment be thereupon given, then without delay you cause to be sent to us, distinctly and openly, under the seal of your court and annexed to this writ, a certified transcript of the judgment roll, bill of exceptions, and other proceedings on file and of record in said cause in your court; that having the same in our supreme court on or before the first day of the next term thereof, to be held at the capitol, in the city of St. Paul, in said State, we may cause further to be done therein what of right and according to the laws of the land ought to be done.

9 Witness the Hon. Lafayette Emmitt, chief justice of said supreme court, and the seal thereof affixed, at St. Paul, this seventeenth day of June, A. D. 1862.

[SEAL.]

A. J. VAN VORHES, *Clerk*,
By A. McELRATH, *Deputy*.

Endorsed: Filed in the supreme court July 1st, 1862.
A. McELRATH, *Dep. Clerk*.

10 State of Minnesota, county of Anoka, district court, fourth judicial district.

HORACE N. COLBATH
against
CORNELIUS F. BUCK.

In the name of the State of Minnesota, to Cornelius F. Buck, the above-named defendant:

You are hereby summoned and required to answer the complaint in this action, which is on file in the office of the clerk of the above-named court, and to serve a copy of your answer to the said complaint on the subscriber at his office, in St. Anthony, Hennepin Co., Min., within twenty days after the service of this summons upon you, exclusive of the day of such service; and if you fail to answer the complaint within the time aforesaid the plaintiff in this action will have his damages assessed by a jury, or the amount he is entitled to recover ascertained by the court or under its direction, and take judgment for the amount so assessed or ascertained.

D. A. SEACOMBE, *Pl'ff's Att'y*.

Dated August 29, 1861.

Endorsed: Filed April 22nd, 1862.

R. M. JOHNSON, *Clerk*.

11 State of Minnesota, district court, fourth district, county of Anoka.

HORACE N. COLBATH
against
CORNELIUS F. BUCK.

The complaint of the plaintiff in the above-entitled action respectfully shows to the above-named court that at Anoka, in said county, on the 28th day of August, 1861, the said pl'ff was the owner of and in the possession of a certain stock of goods, wares, and merchandise, situate and being in a certain stone building lately occupied by the pl'ff as a store, in Anoka aforesaid; that the said goods, wares, and merchandise, at the said time and place, were of the value of and worth the sum of four thousand ($4,000) dollars; that the

said defendant, at the said time and place, without the authority or consent of the said pl'ff, took and carried away from the possession of the said pl'ff all of the said goods, wares, and merchandise; and that the said pl'ff has been damaged in the said premises by the said defendant in the sum of five thousand dollars.

Wherefore the said pl'ff demands the judgment of this court against
12 the said def't for the sum of five thousand dollars, with costs of suit.

D. A. SEACOMBE, *Att'y for Pl'ff.*

Dated August 29th, 1861.

COUNTY OF ANOKA, *ss:*

Horace N. Colbath, the plaintiff in the above and foregoing entitled action, being duly sworn, says that the foregoing complaint is true of his own knowledge, except as to the matters therein stated on his information or belief, and as to those matters that he believes it to be true.

H. N. COLBATH.

Subscribed and sworn to this August 29th, 1861, before me.

C. N. CURTIS,
Justice of the Peace.

Endorsed: Complaint. Filed August 29th, 1861.

C. N. EARL, *Clerk Dist. Court,*
By G. W. PUTNAM, *Deputy Clerk.*

13 District court, fourth district, county of Anoka.

HORACE N. COLBATH, *agst.* CORNELIUS F. BUCK. } 1st case.

The answer of the defendant in the above-entitled action shows to this court—

First. This defendant denies generally and specifically each and every allegation in said complaint contained.

Second. And for a second and further defence, this defendant says that on the 28th day of August, A. D. 1861, and for a long time before and ever since that day this defendant has been and still is marshal of the United States for the district of Minnesota; that on the 28th day of August, A. D. 1861, a certain warrant of attachment was duly issued out of and under the seal of the district court of the United States for the district of Minnesota, in a certain action therein pending, wherein Tertius W. Wadsworth and George M. Wells, partners, as Wadworth & Wells were plaintiffs and George C. Colbath and James H. Colbath were defendants, directed
14 to the marshal of the United States for the said district of Minnesota, and wherein and whereby the said marshal was commanded to attach and safely keep the property, real and personal, of the said defendants in said writ, or so much thereof as would be sufficient to satisfy the claim of the pl'ffs therein stated, as two thousand dollars, to satisfy such judgment as should be recovered in said action; that said warrant of attachment was duly delivered to this defendant, as such marshal as aforesaid, on the day of the issuing thereof; that under and by virtue of said warrant of attachment and in obedience thereto, this defendant, as said marshal as aforesaid, and not otherwise, did on the 28th day of August, A. D. 1861, at Anoka, in the said district of Minnesota, attach and take into his possession the goods and property described in schedule hereto annexed and made a part of this answer, and marked A, and no others, as the property and from the posses-

sion of the said defendants in said execution, and of said warrant of attachment and of his doings thereon this defendant made due return, which is the same taking in the said plaintiffs' complaint complained of; that all the doings of this def't in the premises were done under the process, authority, and command of the court, and not otherwise.

15 Third. And for a third and further defence, this def't shows that on the 28th day of August, 1861, Tertius W. Wadsworth and George M. Wells, partners as Wadsworth & Wells, who were and are citizens of the State of Illinois, commenced their certain action in the district court of the United States for the district of Minnesota, against George C. Colbath and James H. Colbath, who then were and still are citizens of the State of Minnesota, for a sum exceeding five hundred dollars, by causing to be issued out of and under the seal of the said court a certain writ of summons directed to this defendant, as marshal as aforesaid, whereby this defendant was commanded to summon the said defendants, in said writ of summons, to be and appear in the said district court of the United States, on the second day of September, A. D. 1861, to answer to said pl'ffs in said writ of a plea of trespas on the case upon promises to their damage two thousand dollars; that this defendant duly served said writ upon the def'ts therein named, personally, in the said district of Minnesota, and of the said writ made due return, and the said def'ts, on the return day of said summons, duly appeared in said action and their appearance was duly entered of record in said court. This defendant further shows that at the time of the commencement of said action the said defendants therein were indebted to the said plaintiffs therein

16 in the sum of seventeen hundred and one dollars and fifty-six cents, which said indebtedness was incurred on or about the 23rd day of March, A. D. 1861; that at the time of the commencement of said action the said pl'ffs in said action caused to be made in their behalf a certain affidavit setting forth the existence of such indebtedness, and that the defendants in said action had fraudulently incurred said indebtedness by representations as to the condition of their affairs, and that the defendants had disposed of their goods with intent to defraud their creditors, and praying for a writ of attachment against the property of the said defendants; that said affidavit was duly endorsed by the Hon. R. R. Nelson, judge of the said district court of the United States, with an order that on filing the said affidavit, together with a bond approved by him, a warrant of attachment should issue as therein demanded; that thereafter the said affidavit and order endorsed thereon, together with a bond, approved by said Judge Nelson, were duly, and on the 28th day of August, A. D. 1851, filed in the office of the clerk of the said court, and thereupon, and on said last-mentioned day, a certain warrant of attachment was duly issued in said action out of and under the seal of said court directed to the marshal of the United States for the district of Minnesota, and commanding the said marshal to attach and safely keep the

17 property of the defendants therein named within his district, or so much thereof as would be sufficient to satisfy the amount due the said pl'ffs therein stated at two thousand dollars, to answer such judgment as should be recovered in said action; that during all the time aforesaid this defendant was and still is the marshal of the United States for the district of Minnesota; that the said warrant of attachment was delivered to this defendant to be executed on the day of the issuing thereof; that under and by virtue of said warrant this defendant, as marshal as aforesaid, and not otherwise, in the said district of Minnesota, did attach and take into his possession the goods and property described in the schedule hereto annexed and marked A, and made a part of this answer, and none other, and which said goods were of the value of seven hundred and fifty dollars, and no more; and which said taking is the same taking in the plaintiffs' complaint complained of.

And this defendant further shows that after the appearance of the said defendants in said action such proceedings were therein had that on the 27th day of September, A. D. 1861, it was considered and adjudged by the said court that the said pl'ffs in said action should recover of the defendants therein the sum of seventeen hundred and one dollars and fifty-six cents damages, and one hundred and forty dollars and forty cents costs, amounting in all to the sum of eighteen hundred and forty-one dollars and seventy-six cents, which said judgment was by the said court, on said day duly rendered, and on the same day duly docketed in the office of the clerk of said court.

That on the 28th day of September, A. D. 1861, a certain writ of execution was duly issued out of and under the seal of the said court in the aforesaid action, directed to the marshal of the United States for the said district, by which he was commanded to make or cause to be made the amount of the said judgment out of the personal property of the said defendants therein named, and if sufficient personal property could not be found, then out of the real property which the said defendants or either on the 28th day of August, A. D. 1861, or at any time thereafter, and that he should have the said money before the justice of said court within sixty days after the receipt by him of the said writ, to be rendered to the said plaintiffs.

That said execution was duly endorsed with a direction thereon to levy the sum of eighteen hundred and forty-one dollars and seventy-six cents, with interest on seventeen hundred and one dollars and fifty-six cents thereof from the 28th day of August, A. D. 1861, and was delivered to this def't on the day of the issuing thereof.

That under and by virtue of said writ as marshal, and not otherwise, this defendant did, on the 2nd day of October, 1861, in the said district of Minnesota, levy upon and take into his possession the goods and property described in the schedule hereto annexed and marked A, and made a part of this answer, and none others, as the property of the defendant in said writ of execution, which said taking, under said writs as aforesaid, is the same taking in the complaint of the plaintiff complained of.

Wherefore this defendant asks to be hence dismissed, with his costs in this behalf expended.

ALLIS & PECKHAM,
Def't's Att'ys, City of St. Paul.

RAMSEY COUNTY, *ss:*

Cornelius F. Buck, of said county, being duly sworn, deposes and says that he is defendant in the foregoing entitled action and knows the contents of the foregoing answer, and that the same is true of his own knowledge, except as to matters which are therein stated on his information or belief, and as to those matters he believes it to be true.

C. F. BUCK.

Subscribed and sworn to before me this 3rd day of October, 1861.

[SEAL.]

H. C. NEWHALL,
Notary Public, Ramsey Co., Minn.

A.

10 pair men's calf boots.
12 pair men's super boots.
9 pair prairie boots.
12 pair kip boots.
9 pair best boots.
12 pair sup. calf boots.

12 pair gents' thick boots.
12 pair boys' best kip boots.
9 pair men's calf boots.
10 pair best thick boots.
9 pair peg calf boots.
4 pair grained boots.
12 pair calf boots.
8 pair boys' boots.
12 pair tip'd men's boots.
23 pair boys' kip boots.
8 pair cavalry boots.
18 pair fine calf ½ sole boots.
13 pair balmoral boots.
11 pair congress boots.
28 pair misses' shoes.
27 pair ladies' calf boots.
18 pair youth's shoes.
22 pair misses' calf boots.
18 pair youth's shoes.
22 pair misses' calf boots.
17 pair grained shoes.
10 pair men's kip boots.
54 pair boys' brogans.
58 pair men's kip brogans.
50 pair fine laced boots.
13 pair ladies' calf boots.
18 pair misses' calf boots.
17 pair amb'd kip brogans.
12 pair enamelled congress boots.
8 pair congress boots.
7 pair lasting shoes.
20 pair Oxford ties.
10 pair women's ½ sole boots.
27 pair women's enamelled boots.
8 pair women's balmoral boots.
12 pair fancy boots.
9 pair congress gaiters.
19 pair woman's calf boots.
3 pair woman's fancy boots.
21 pair woman's calf boots.
1 doz. cast-steel axes.
14 barn shovels.
22 hoes.
55 lbs. ½-inch rope.
106 lbs. 1-inch rope.
3 frock coats.
4 business coats.
1 frock coat.
1 business coat.
4 sack coats.
21 1 business coat
1 frock coat.
5 business coats.
1 frock coat.
1 business coat.
5 thin summer coats.

5 business coats.
3 black summer coats.
2 business coats.
5 satin vests.
3 lasting vests.
19 pair black summer pants.
14 woolen pants.
13 woolen blue pants.
16 woolen gray pants.
5 woolen vests.
10 vests, satin.
2 vests, blue.
3 vests.
14 light vests.
10 pair pants.
6 coats and vests.
4 business coats.
1 sack.
4 business.
13 sack.
2 vests.
5 pair black pants.
10 pair summer pants.
8 sack coats.
3 coats.
1 coat, light.
1 coat, blue.
2 sack coats.
2 business suits.
4 p'r Marsailles pants.
8 summer coats.
15 pair pants.
23 linen coats.
1 lasting vest.
4 summer vests.
8 pair linen pants.
1 pair summer pants.
1 pair Marsailes pants.
3 pair summer pants.
1 summer coat.
21 linen coats.
1 summer vest.
1 yellow vest.
1 summer vest.
5 p'rs linen pants.
8 white linen coats.
13 Marsailes vests.
2 summer coats.
2 woolen coats.

Endorsed: Answer. Filed April 22nd, 1862.

R. M. JOHNSON, *Clerk.*

22 State of Minnesota, district court, fourth district, county of Anoka.

HORACE N. COLBATH
against
CORNELIUS F. BUCK.

The plaintiff in the above-entitled action, replying to the answer of the defendant therein, alleges that at the time of the taking, by the def't, of the goods and chattels mentioned in said answer the said plaintiff gave the defendant due notice that the said goods and chattles were the property of him, the said plaintiff, and forbid the defendant taking the same.

D. A. SEACOMBE, *Att'y for Pl'ff.*

HENNEPIN COUNTY, *ss:*

David A. Seacombe, being duly sworn, says that he is the attorney of the pl'ff in the above-entitled action; that the above reply is true of his own knowledge, except as to matters therein stated on his information or belief, and as to those matters that he believes it to be true; that the knowledge and grounds of belief of deponent on the subject are derived from statements made to deponent by said pl'ff, which statements deponent believes to be true; and that the absence of said plaintiff from this county, where
23 deponent resides, is the reason why this verification is not made by the plaintiff.

D. A. SEACOMBE.

Subscribed and sworn to this October 23rd, 1861, before me.

CHAS. J. SEACOMBE,
Notary Public, Hennepin Co., Min.

Endorsed: Reply. Filed April 22nd, 1862.

R. M. JOHNSON, *Clerk.*

The jury in the case of H. N. Colbath *vs.* C. F. Buck rendered the following verdict, viz:

For the plaintiff in the sum of two thousand four hundred and seventy-eight and 91-100 dollars, ($2,478 91-100)

H. F. BLODGETT, *Foreman.*

Anoka, April 22, 1862.

Endorsed: Verdict. Filed April 22nd, 1862.

R. M. JOHNSON, *Clerk.*

24 STATE OF MINNESOTA,
County of Ramsey, ss:

Henry L. Williams, of said county, being duly sworn, deposes and says that on the 9th day of May, A. D. 1862, he served the annexed proposed case of def't upon D. A. Seacombe, esq., the attorney of the pl'ff in the action therein entitled, by depositing in the post office, at St. Paul, in said county, (and prepaying the postage thereon,) a true copy thereof, securely enclosed, directed to said Seacombe, at St. Anthony, Min.

HENRY L. WILLIAMS.

Subscribed and sworn to before me this 21st day of May, A. D. 1862.

[L. S.] JAS. W. GORMAN, *Notary Public, Min.*

25 District court, fourth district, county of Anoka.

HORACE N. COLBATH
against
CORNELIUS F. BUCK.

Be it remembered, that on the 21st day of April, A. D. 1862, the above-entitled action came on to be tried before the Hon. Charles E. Vanderburg and a jury, when the defendant moved to dismiss the complaint on the ground that it was insufficient, as it did not allege a wrongful taking.

The court denied said motion, and the def't excepted.

The defendant then moved for judgment on the pleadings, which motion was also denied and defendant excepted.

Mr. Seacombe, of counsel for the pl'ff, then opened the case to the jury, stating that the pl'ff did not claim that the marshal took away other goods than those he admits taking in his answer.

The pl'ff then offered in evidence a bill of sale in the words and figures following, to wit, (a copy of which is hereto annexed marked "A.") And then called Horace N. Colbath, who testified:

"I am plaintiff in this action. I know defendant, and I know the goods mentioned in the complaint. On the 25th day of August last the goods were situate in my store at Anoka. They were on that day taken from my
26 possession by C. F. Buck, the defendant in this action; all the goods in the store were so taken. The value of the goods at that time was $4,000. The goods taken were a portion of the goods mentioned in the bill of sale. The goods had been in my possession until taken by Buck."

Being cross-examined the witness said: I cannot say that I have read the schedule annexed to the answer in this case, nor that annexed to the copy. The goods taken were all that were in the store.

Question. "Were any of those goods returned to you ?"

(Objected to by the plaintiff, on the ground that it was not pleaded and as not a cross-examination.)

The court sustained the objection, and the def't excepted.

The defendant did not carry away all the goods in the store. Those he did not carry away remained in my store.

Redirect.

The defendant took the exclusive control of all the goods in the store. Def't never gave up to me in any manner the control of these goods. Some of them he did not carry away from the store.

Recross.

The marshal gave his deputy the key to the store. I received they key of the store from the deputy of the marshal some time in October. The key was not offered to me before the time I received it. I could get into my store by applying to the deputy marshal and he unlocking the door and letting
27 me in. I presume these goods remained in the store all that time. The defendant never carried away any goods from the store except at the first taking. I have not those goods now. I have since sold them.

Redirect.

The value of the goods left was some $16,000 or $17,000. When the defendant came to take the goods I told him they were my property. I told him nothing else. Def't then made a levy.

The foregoing was all the evidence given to the jury.

The defendant then requested the court to charge that, it being admitted by the pleadings that the def't took the goods as United States marshal for

the district of Minnesota, by virtue of process issuing out of the United States district court for the district of Minnesota, the right of property in the goods cannot be tried in this court and there must be a verdict for the defendant.

The court refused so to charge, and def't excepted; and, on the contrary, the court charged the jury that such a taking would be no defence to this action unless the jury should find that the property in the goods was in Geo. C. Colbath & Co., the def'ts in the process, and that that question was for them to try, to which the defendant duly excepted.

The defendant further asked the court to charge that under the pleadings it was incumbent on the pl't'ff to show not only a sale but a valuable
28 consideration, and that not having done so he must fail.

The court refused so to charge, and the def't excepted.

The jury, after retiring, returned into court with a verdict for the pl'ff for $2,478 91; whereupon defendant gave notice of a motion for a new trial.

Endorsed: Proposed case of def't, filed May 23d, 1862.

R. M. JOHNSON, *Clerk.*

(Copy.)

Know all men by these presents that we, G. C. Colbath & Co., in consideration of the sum of twelve thousand (12,000) dollars, to us in hand paid by Horace N. Colbath, the receipt whereof is hereby acknowledged, have sold, transferred, and assigned, and by these presence do sell, transfer, and assign, unto the said Horace N. Colbath the entire stock of goods and merchandise now situate in our store in Anoka, Anoka County, Minnesota; and also in our store and warehouse at Monticello, Wright County, Minnesota; also a lot of goods in St. Paul, in the storehouse of Temple & Beaupre,
29 or on the road from St. Paul to Anoka; also all of our notes and book accounts, also all judgments in our favor, and all our interest in all pending suits. To have and to hold the same to the said Horace N. Colbath, his heirs and assigns, forever.

In witness whereof, we have hereunto set our hand this May 21st, 1861.

G. C. COLBATH & CO.

In presence of—
D. A. SEACOMBE.

Endorsed: Bill of sale, A. Filed June 4th, 1862.

R. M. JOHNSON, *Clerk.*

30 District court, fourth district, in general term for county of Hennepin, in Minneopolis, May 26th, 1862.

H. N. COLBATH
against
CORNELIUS F. BUCK.

This case having come on to be heard at this term, on a motion by defendants to set aside the verdict and for a new trial on the case made, and after hearing W. H. Peckham for motion and D. A. Seacombe, esq'r, opposed, it is ordered that the said motion be denied.

CHAS. E. VANDERBURGH, *Judge.*

Endorsed: Granted on the hearing, and certified to Anoka County, May 26th, 1862.

R. O. HAMLIN, *Clerk of Hennepin Co.*

Filed May 30th, 1862.

R. M. JOHNSON, *Clerk.*

31 State of Minnesota, district court, fourth district, county of Anoka.

HORACE N. COLBATH
against
CORNELIUS F. BUCK.

Amount of verdict		$2,478 91
Costs and disbursments :		
Costs paid clerk as required by law for jury fee	$3 00	
Clerk's fees	3 62	
		6 62
		$2,485 53

Costs taxed June 3d, 1862.

R. M. JOHNSON, *Clerk.*

Endorsed : Taxing of costs.

32 State of Minnesota, county of Anoka, district court, fourth district.

HORACE N. COLBATH
ag'st
CORNELIUS F. BUCK.

This action being at issue, and having been tried before the Hon. Chas. E. Venderburgh, judge of the district court of the fourth judicial district, and a jury on the 22d day of April, A. D. 1862, and the verdict of the jury having been entered, whereby they find for the pl'ff, Horace N. Colbath, in the sum of two thousand four hundred and seventy-eight dollars and ninty-one cents, now, on motion of D. A. Seacombe, attorney for the pl'ff, it is hereby ordered and adjudged by the court that Horace N. Colbath, the plaintiff, recover of Cornelius F. Buck, the defendant, the aforesaid sum of two thousand four hundred and seventy-eight dollars and ninty-one cents, together with the sum of six dollars and sixty-two cents costs and disbursements, amounting in the wholesum of two thousand four hundred eighty-five dollars and fifty-three cents.

R. M. JOHNSON, *Clerk Dist. Court.*

33 State of Minnesota, county of Anoka, district court, fourth district.

HORACE N. COLBATH
against
CORNELIUS F. BUCK.

STATE OF MINNESOTA, COUNTY OF ANOKA,
Clerk's Office, June 30th, 1862.

I do hereby certify that I have compared the foregoing copy of the judgment roll in the above-entitled action, and of the endorsements thereupon, with the original now remaining on file in my office, and that the same is a correct transcript therefrom and of the whole of said original judgment roll, and that foregoing is a true copy of all the papers in the above-entitled action.

In testimony whereof, I have caused the seal of the district court of Anoka County to be hereunto affixed this 30th day of June, 1862.

R. M. JOHNSON, *Clerk.*

34 State of Minnesota, supreme court, general July term, July 21st, 1862, sixteenth day.

Court met pursuant to adjournment, present a full bench.

CORNELIUS F. BUCK, pl'ff in error,
against
HORACE N. COLBATH, def't in error.

This day appeared the parties to this action by their respective attorneys, and thereupon this cause came on for hearing and argument upon the answer made to the writ of error herein, and was thereupon by counsel submitted to the court, and by the court taken under advisement.

A true record.

Attest: A. McELRATH, *Dep't Clerk.*

35 Supreme court, State of Minnesota, July general term, 1862.

CORNELIUS F. BUCK, pl'ff in error,
against
HORACE N. COLBATH, def't in error.

Whereas the district court of the fourth judicial district, within and for the county of Anoka, did, to wit, on the third day of June, A. D. 1862, render and enter judgment in this cause in favor of the above-named defendant in error, (the pl'ff below,) and against the above-named pl'ff in error, (the def't below,) for the sum of two thousand four hundred eighty-five dollars and fifty-three cents ($2,485 53) damages and disbursement.

And whereas the said def't below feeling aggrieved thereby did, to wit, on the seventeenth day of June, A. D. 1862, duly sue out of our supreme court a writ of error to bring said cause before said court for the correction of alleged error therein by the record of said cause appearing.

And whereas the same came on to be heard in its order upon the calendar at the general July term A. D. 1862, of our supreme court, upon the answer made by the judge of said aforesaid district court to the said writ of error, and after hearing counsel of the respective parties therein, and due deliberation thereupon had, the court did, on the sixth day of March, A. D. 1863, determine, decree, and order that the judgment of the court below, to wit, the district court of the fourth judicial district, within, and for the

36 county of Anoka, be, and the same is hereby, in all things affirmed:

Now, therefore, in pursuance of said order it is now here adjudged that the judgment of the court below be, and the same is hereby, in all things affirmed, that said defendant in error recover of the said plaintiff in error the sum of two thousand five hundred ninety-eight dollars and fifty-six cents, ($2,598 56,) the amount of the judgment below, with the interest from the said 3d day of June, 1862, added thereto, together with the costs and disbursements of this court to be by the clerk taxed, and that he have execution therefor.

Dated and signed this sixth day of March, 1863.

By the court.

Atttest: A. J. VAN VORHES, *Clerk,*
By E. H. BURRITT, *Dep'y.*

Statement for judgment:

Am't of judgment below	$2,485 53
Interest from June 3d, 1862	113 03
	2,598 56

SUPREME COURT, *State of Minnesota, ss:*

I hereby certify that the above is a true and authentic copy of the entry of judgment of record in the supreme court in the action therein as above entitled.

In testimony whereof, I have hereunto set my hand and affixed the seal of the supreme court, at St. Paul, this sixth day of March, A. D. 1863.

[SEAL.] E. H. BURRITT, *Dep't Clerk.*

37 SUPREME COURT, *State of Minnesota, ss:*

I, A. J. Van Vorhes, clerk of said court, do hereby certify that I have carefully compared the above and foregoing with the original record, process, and judgment roll in the action wherein Cornelius F. Buck is plaintiff in error and Horace N. Colbath defendant in error, now remaining on file and of record in my office, and that the same is a true and authentic transcript thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said supreme court, and attached hereto the proper stamp of the United States, at St. Paul, this seventh day of April, A. D. 1863.

[SEAL.] A. J. VAN VORHES, *Clerk.*

Filed January 29, 1864.

UNITED STATES

SUPREME COURT.

CORNELIUS F. BUCK, P'l'ff in Error, *against* HORACE N. COLBOTH, Defendant in Error.	Error to the Supreme Court of the State of Minnesota. Number 135.

STATEMENT OF CASE.

Action of Trespass De Bonis against the United States Marshal

The declaration (or complaint as it is called by the Minnesota code) is the ordinary declaration

The answer contains three separate defences, equivalent to three separate pleas. They are:

1st. A general denial; equivalent to the general issue.

2nd. A special plea of justification that the Deft., as U. S. Marshall took the goods under a writ of

attachment issued out of the U. S. District Court against Geo. C. & Jas. N. Colbath, in an action against them by Woodworth & Wells, as the property of the defendant therein, and from th possession of the defendant therein, and that the taking was the same as that alledged in the complaint: " *That all the doings of the defendant in* " *the premises were done under the process, direc-* " *tion, authority and command of the Court and* " *not otherwise.*"

See Record of No. 135, p. 7. fols. 19 & 20.

3d. The third plea sets up the facts of an indebtedness, affidavits as to the same, &c., and the entry of judgment after the commencement of this action and generally, the allegations necessary to raise questions of fraud in an assignment or sal e

The reply admits the whole of the answer as to the taking under process and from the possession of the defendants in the writ, but alleges that the plaintiff at the time of the taking gave the defendant notice that the goods were his property.

Record No. 135, p. 11, fol. 28.

At the trial the defendant moved for judgment on the pleadings, which motion was denied and defendant excepted. Fol. 30.

At the conclusion of the evidence, the defendant requested the Court to charge, " That it being admitted " by the pleadings that the defendant took the goods " as United States Marshal for the district of Minne- " sota by virtue of process issuing out of the United " States District Court, for the District of Minnesota, " the right of property in those goods cannot be trie d

"in this Court, and there must be a verdict for the "defendant.

"The Court refused so to charge and the defendant "excepted.

"And on the contrary the Court charged the Jury, "that such a taking would be no defence to this ac- "tion, unless the jury should find that the property "in the goods was in George C. Colboth & Co., the "defendants in the process, and that that question "was for them to try. To which defendant duly ex- "cepted."

Record p. 12, fol. 31.

A verdict being rendered for the plaintiff, judgment was entered thereon, which judgment was, on Writ of Error, affirmed by the Supreme Court of the State.

Record p. 15, fol. 40.

The defendant in Error has noticed a motion to dismiss the writ of error to this Court, for want of jurisdiction.

POINTS.

I.

This Court has jurisdiction under the 25th section of the judiciary act.

The defendant's second plea is one of justification, and he alleges that he took the *property as* Marshall, under United States Court process, from *the possession* of the defendant *named* in that process and as the property of those defendants.

None of those allegations are denied in the reply, and they are consequently admitted. Minnesota code —compiled statutes, p. 543, sec. 88.

And the question whether they constituted a defence was directly brought to the attention of, and passed upon by the Court.

Record p. 12, fol. 30 & 31.

The Supreme Court of the State too, regarded the question as raised, and decided it, and has published a most elaborate opinion, 7. Minn., R. p. 310. The Record directly raises the question of the "validity of an authority exercised under the United States" Judiciary Act, sec. 25.

It raises it in two ways:

1st. By the motion for judgment on the pleadings, Record p. 12, fol. 30,—This motion raised an issue or question of law, and no demurrer was necessary.

a. The Minn. Code expressly provides for such a motion, compiled statutes p. 541, sec. 75.

b. It is the well settled practice to raise questions of law as to the sufficiency of pleadings in that way.

1st. Van Santvords, Pl. p. 466-8, Van Valen, vs. Lopham, 13 How. Pa. R. p. 246, Bridge vs. Payson, 5th Sandford, N. Y. 210.

The codes of Minnesota & N. Y. are alike.

2d. By the request to the Court to charge, and the exceptions thereto, R. p. 12.

In Day vs. Gallup, 2d, Wallace 105, the writ was

dismissed because this question was not raised by the record. In that case the action prior to the trial had been dismissed as to the U. S. Marshal, and the Court decided that it was plain from the record, that during the trial "the defendants did not *then* consider "that there was any necessary connection between "Gallup's complaint and themselves on account of "the seizure and sale of the former's goods under the "process of the Federal Court."

It thus becomes plain that in the final judgment of the State Court, "an authority exercised under the United States was drawn in question," and that the decision of the State Court was against its "validity." This Court therefore has jurisdiction.

See Freeman vs. Howe, U. S. R. 457, Gelston vs. Hoyt, 3d W., 309-10, Crowell vs. Randall, 10 Peters 368

II.

The State Court erred in its decision.

a. It is conceded that had this action been replevin instead of trespass the defence must have been sustained.

Freeman vs. Howe, 24th How. 450,
Lewis vs. Buck, 7 Minn. R. p. 104.

If replevin would not lie—neither will trespass; they are *universally concurrent* remedies. To hold that this action may be maintained without at the same time overruling Freeman vs. Howe, would be to assert the legal absurdity, that the Marshall had the right to and was bound *to take* the goods, and yet was liable for a *trespass*—had the right to and was bound *to hold them*, and yet was liable for the detention.

b. The principles upon which the case of Freeman vs. Howe was decided, necessarly determined this case.

Those principles are two—

1st, That where the officers of a Court, State or National, have taken possession of a "res" under process of *attachment* or *execution as the property of the defendant in such process*, such "res" is in the custody of the law, and the possession of such officers or Court is exclusive.

2d, That the question whether such "res" so *seized as* the property of the defendant in the process *is rightfully* seized by the Marshal *as* the *property* of the defendant in the process or otherwise subject to the exigency of the writ is one of *jurisdiction*, *the authority* to *decide* which belongs exclusively to the Court issuing the process, or in the language of this Court the "*question* is one of right and title to the property under the Federal process and which belongs to the Federal, not the State Courts to determine." 24 How'd, 457.

Neither of these principles are new.

The first is more particularly illustrated by the case of Taylor vs. Caryl, 20 How. 583. & cases cited

The second by the case of Slocum vs. Mayberry, 2d Wheaton U. S. vs. Peters, 5 Cranch 100; Wallace vs. McConnell, 13 Peters 136, Peck vs. Jenness, 7 How. 612. See also Drake on Attachments, section 619.

The defendant in error and also the State Court seek to escape from the conclusiveness of the decision

in Freeman vs. Howe by claiming that it applies only to the action of replevin, which by taking the *res* itself from the possession of the Court obstructs its jurisdiction. Such however cannot have been the ground of decision in Freeman vs. Howe, because a taking in a replevin suit being a *forcible* taking would *not* obstruct the jurisdiction of the prior Court over the "res": and this Court so expressed itself in that case—p. 457.

But the objection this Court found to the action of replevin was "that it would draw into the State "Court all questions of the liability of property "seized upon mesne and final process, etc"—p. 459. And this effect certainly would equally follow the action of trespass as that of replevin.

The true principle of Freeman vs. Howe is that whenever property is seized by the Marshall under process *as* the property of the defendant in the writ *the question* whether it *was subject to such process as his property* or otherwise is one exclusively appertaining to the Federal Court.

The principle was clearly stated as early as 2 Wheaton, p. 1, by Ch. J. Marshall in Slocum vs. Mayberry. "If," says the learned Chief Justice, "If the officer has a right under the United States to seize for a supposed forfeiture" (to seize the goods *as the property* of the defendant) "the *question* whether that forfeiture has been actually incurred" (whether they are the goods of the defendant in the writ) "belongs exclusively to the Federal Courts *and cannot be drawn to another forum.*"

That is *if* supposing a forfeiture to have been incurred the Marshal would have a right to seize, or if supposing the goods to be the property of the defendant

in the writ the Marshal would have a right to seize them; then the the *question* whether a forfeiture had been incurred or whether the goods were the property of the defendant in the writ, belongs exclusively to the Federal Court and *cannot be drawn to another forum.*

And the learned Chief Justice limits the right to proceed for *damages* in the *State* Court until after the decision *of the question* by the Federal Court. 2 W. p. 10.

In that case the law authorized the arrest and detention of the vessel on certain facts for purposes of trial and condemnation. The Marshal also took the cargo. This Court held that inasmuch as if a forfeiture had been actually incurred the Marshal would have had no right to take or detain the cargo, therefore as to the cargo there was no que tion that belonged to the Federal Courts to determine. The question belonging exclusively to the Federal Courts was: Had a forfeiture been incurred? But the right to the cargo was not involved in that question. Even if a forfeiture had been incur ed the Marshal had no right to seize or detain the cargo. Therefore *replevin* in the State Court for the cargo was *sustained*, while it is expressly stated that had the action been for the vessel the decision would have be n different.

In all cases of this kind the gist of the matter is not the nature of the action whether replevin or trespass, but whether the action whatever it might be interferes with the exclusive jurisdiction of the Federal Court to determine some certain question.

Thus in Slocum vs. Mayberry no such queston being involved, replevin in the State Court was sus-

tained; in Freeman vs. Howe such a question being involved, replevin was not sustained.

In Gelston vs. Hoyt, 3 Wheaton, 313-4, it was decided that an action of trespass in the State Court would not lie for an alleged wrongful seizure until after the Federal Court had determined the question of the validity of the seizure. "If," says the Court, "If the action be commenced while the proceedings "in rem for the supposed forfeiture are pending in "the proper Court of the U. S., it is commenced too "soon; for until a final decree it cannot be ascer- "tained whether it be a trespass or not." And if after a final decree then that decree is conclusive on the question of trespass or no trespass—3 Wheaton 314.

The two cases then of Slocum vs Mayberry and Freeman vs. Howe show that replevin in a State Court will or will not be sustained according as it involves or does not involve a question which the United States Court has exclusive jurisdiction to determine.

The case of Gelston vs. Hoyt, also decides that trespass cannot be maintained in a State Court, when it involves a *question* which the U. S. Court has exclusive jurisdiction to try.

The case of Freeman vs. Howe, also decides that whether the attachment in that case justified the Marshal in taking the property in question, "involved a *question* of right and title to the property under the "Federal process, and which it belonged to the Fed- "eral, and not to the State Courts to determine."

Is not the inference irresistible that this action is "*commenced too soon*," and that it cannot be maintained until *after* the decision by the Federal Court of

this *question*, of the right and "title to the property under the Federal process."

See also U. S. vs. Booth 21st, How. 506.

To the same effect were the decisions of the New York Supreme Court, and Court of Errors and Court of Chancery in the case of Gelston vs. Hoyt, 13 John 561—1st John. Ch. 543. ~~In Gelston vs. Hoyt,~~ and in the Supreme Court and Court of Errors in Novian vs. Hallett, 14 John 273 & 16 John 327, the action of trespass was sustained after the United States Court had decided the question of forfeiture exclusively belonging to it.

In Novian vs. Hallett, the same Supreme Court and Court of Errors decided that an action of trespass could not be maintained before the decision by the Federal Courts of the question of prize therein involved; the Supreme Court & Court of Errors, only differing as to whether the question of prize was involved in the case.

It it were not, of course trespass could be maintained on the same principle on which replevin for the cargo was sustained in Slocum vs. Mayberry.

It is true that in the case of Novian vs. Hallett, the Court seems to hold that with regard to questions of prize no action can be maintained in the State Court, either after or before the decision by the Federal Court of the question of prize.

This rule thus sanctioned by several leading English cases, and by several cases in State Courts referred to in the case of Novian vs. Hallett, seems opposed in principle to the case of Gelston vs. Hoyt, previously decided in the Corts of New York, and to the decision of this Court in that case. It is not easy to say

why trespass or replevin should not be maintained in the State Court after the decision by the Federal Court of the exclusive question of prize, as well as after the decision of the exclusive question of forfeiture. The case of Novian vs. Hallett goes even further than is necessary for the plaintiff in Error in the case at bar.

Nor is the rule of exclusive jurisdiction to try certain questions confined to such cases as arise from the nature of the question itself. In Wallace vs. McConnell 13, Peters, 151, the question was one of which in itself, the jurisdiction of the Courts was concurrent, but it was held that the right to try that question became exclusive in the Court in which an action was first commenced.

To the same effect is Peck vs. Jenness, 7 How., 612, holding the prior jurisdiction of a State Court, to decide a certain question to be exclusive.

And the very point decided in Freeman vs. Howe, is that by the commencement of the action, the U. S. Court acquired exclusive jurisdiction to decide the question, whether property seized under its process was rightfully or wrongfully seized.

It is confidently submitted that in the whole series of cases, bearing on this question no hint or suggestion can be found making the nature of the action, whether trespass or replevin the ground of the decision; but that they all rely upon the safe and sure ground of an exclusive right to try a certain question.

III.

It was argued in Day vs. Gallup that a State Court would have jurisdiction to try the question after the case in the U. S. Court was concluded and thus no

longer pending, and the question had not therein been raised or decided.

See 2 Wallace, 113.

Such was the fact in that case and the fact is alluded to in the opinion of the Court as showing, together with other facts, that this question was not raised by the record in that case.

But such is not the fact in this case. The second plea is a naked justification under a warrant of attachment issued on the 28th of April, 1861. Record fol. 20. The third plea shows a judgment, entered September 27th, 1861. Record fol. 22. And this suit was commenced Sept. 2d 1861, Record fol. 11 & 17, complaint filed Sept. 3d 1861, fol. 17.

So far as the second plea is concerned it does not appear that the case in the Federal Court had even proceeded to judgment; and that one plea cannot be aided, vitiated, proved or disproved by another, is well settled.

1st. Chittys Pleadings 563, Gould's Pleadings 432 sec. 25, 22nd Barbour 335, 5 Sandford 210.

So far as the third plea is concerned, it shows the case in the U. S. Court still pending when this action was commenced, and even at the time of the plea the execution still unreturned, and consequently the case even then pending so far as the effect of its final process was concerned.

And the judgment thus obtained subsequently to the commencement of this action was properly pleaded and had it been put in issue would have been proper evidence. Rinchey vs. Stryker, 28th N. Y., 45.

So that the argument sound or unsound is inapplicable to this case.

BUT IT IS NOT SOUND.

When we say that a Court has exclusive jurisdiction to try a certain question, we mean that any party interested has a right o have such question tried in that forum. *It is the right of the party*, and a right of which he cannot be divested by any proceeding, in any other Court.

In Wallace vs. McConnell 13 Peters 151, the Court say, "the jurisdiction of the District Court, and the "right of the plaintiff to prosecute his suit in that "Court, having attached, *that right* could not be arrested or taken away."

In Peck vs. Jenness 7 How. 624-5, the same language is again used. Thus "The right of the Court to decide every question that occurs in a cause." Ib., is more properly termed the *duty* of the Court and the *right* of the plaintiff or other party.

By the issuing and levy of his attachment, the plaintiff acquired a lien on the goods, Rinchey vs. Stryker 28th N. Y. 45. Having that lien he had the right to file a bill to remove any claim or cloud that interfered with his right to have such goods appropriated to the payment of his debt. Such a bill would be ancillary to the main action and therefore would not depend on citizenship &c.; or the plaintiff may rest content with levy, and proceed to sell the same under his final process, and if any person desires to dispute with the Marshal or plaintiff, the rightfulness of such sale, they must come into the U. S. Court to do it—otherwise they subject themselves to the ordinary consequences of a failure to raise and litigate in a suit a question in-

volved in it, and embraced within its issues—the suit is nevertheless a bar. Guernsey vs. Carver 8 Wend, Stevens vs. Lockwood, 15 Wend. 645; Necor vs. Sturgis, 16 New York, 548.

The question whether the goods belong to the defendant in the writ is to be sure not directly in issue in the suit—but as against the Marshal or plaintiff, it is involved in the suit as a question of the "liability of property seized upon, mesne or final process."

That such questions belong exclusively to the Court issuing the process, is a doctrine as old as the common law—thus no action for false imprisonment or malicious prosecution could be maintained until the writ had been set aside or the party acquitted in the Court in which the proceedings originated. 1st. Burrill's P. 197, 2nd. Greenleaf on Ev., sec. 449, Brown vs. Crowel, 5 Wend, 298, Bissill vs. Kip, 5 John. 100.

Now although in the State Courts and in England this rule has been relaxed so far as to allow third parties to sue a Sheriff or Marshal for the taking of their goods, even when taken by him in good faith as the goods of the defendant in the writ; yet the very gist of the decision in Freeman vs. Howe is that, as between State and Federal Courts, owing to their peculiar constitution, the rule still obtains. 24 Howard, 457.

This being so, no action can be maintained in the State Court against the plaintiff or Marshal for the taking under process, at any time or ever, until, in some manner and by some process, the U. S. Court has passed upon the question whether the property was subject to the exigency of the writ,

If the plaintiff in the action does not file his bill to subject the goods to sale under his execution, it

then becomes necessary for the claimant to avail himself of the remedies suggested in Freeman vs. Howe, (and suggested too exclusively,) in order to obtain the decision of the U. S. Court upon this question. Or, possibly, a claimant might sue in trespass or replevin in the U. S. Court if the citizenship would give jurisdiction, or if an action at law could also be regarded as ancillary.

This rule does not interfere with the right of the claimant to bring replevin or trover, in the State Court, against a purchaser at the Sheriff's sale after demand, because then the effect or regularity of process is no longer interfered with, the property having actually been subjected to its exigency; but it prevents any action against either *the plaintiff or the Marshal on account of any taking, detention or conversion of the property under and by virtue of the process*, because such an action would obstruct the right of the plaintiff to have all such questions litigated in the U. S. Courts, and the exclusive jurisdiction of the U. S. Courts to decide the same. The question of the absolute title to the property is not necessarily drawn in question in the U. S. Court primary suit, but the question of the right of the Marshal or plaintiff *to seize and detain, as the property of the defendant in the writ*, is necessarily drawn in question.

In case the right of property is not actually drawn in question, *i. e.*, if no bill is filed to test the question whether the goods are the property of the defendant in the writ, then the only question decided by the U. S. Court action is, that the plaintiff or Marshal rightfully sold the interest of the defendant in the property, and that the seizure thereof by the Marshal for that purpose was lawful. What that interest is, is not decided. The purchaser may get a good title, or

none at all; but the acts of the plaintiff and Marshal are justified by their writ, so far as the State Court are concerned, They can only be made accountable in the U. S. Courts.

Thus the right of the plaintiff to have all questions decided in the forum of his choice, the right of the Marshal to be protected in acts *bona fide* done under and by virtue of process (*unless his own Court shall decide that the act was unauthorized by the process*), and the dignity and self-respect of the Court in retaining the exclusive right to decide as to its own jurisdiction and as to the "liability of property seized upon its own mesne or final process," are all upheld and sustained, while the right of the claimant to pursue in the State Court any remedy, either of replevin or for damages against the purchaser at the Marshal's sale, or against any other person (except the Marshal or the plaintiff in the original suit), on the ground that the defendant in the writ had no property in the goods, and that the purchaser at the sale acquired none.

The plaintiff, too, would be liable in the State Court, if he became the purchaser at the Marshal's sale—for he would have to rely only on his title as purchaser—the goods would no longer be in the custody of the court, and they would have been subject to the exigency of the writ.

The limitation on the right of the claimant to sue in the State Court is only, that, if he would sue the Marshal or the plaintiff, either in trespass or replevin, for the original taking under the process on the ground that the goods were not liable to the exigency of the process, he must bring that suit in the U. S. Court, either in the manner suggested in Freeman vs. Howe, or in some other manner.

This is the ground upon which Freeman vs. Howe was decided, and it is the only ground upon which it can be sustained. This court, in such cases, claims no exclusive jurisdiction over the question whether the property seized was the property of the defendant in the writ or of the claimant. It is only when, by *the suit being against the Marshal or the plaintiff, the question of property "involves a question of right and "title to the property under the Federal process, which "it belongs to the Federal and not to the State Courts "to determine," that this court asserts exclusive jurisdiction.*

It is most clear that such question is "involved" whenever a suit is brought against a Marshal or plaintiff for acts done under the process, and for which he claims the process to be a justification, whether such suit is brought before or after the return of the process, and whether it is trespass or replevin.

It is also most clear that to allow such suit to be brought in the State Court after return of process for acts done under and not subsequent to the process would equally "draw into the State Courts all ques-"tions of the liability of property seized upon mesne "or final process, issued under the authority of the "Federal Courts," as if it had been brought prior to such return.

In short, it is evident that *the time* of bringing the action affords no solution of the difficulty. The claim of the Federal Courts is of the exclusive right to decide when the acts of their own officers or their own suitors are protected by their own process. That right admits of no limit by time.

Either party, too, may, if they choose, have the question of title decided before sale.

The plaintiff may file his bill against the claimant to have the cloud of his claim removed, or the claimant may intervene and file his bill as suggested in Freeman vs. Howe. In either case the same question will be raised.

In conclusion it is most respectfully submitted that there is not an object to be attained or an evil to be remedied in forbidding replevin as in Freeman vs. Howe, that is not equally to be attained or remedied by forbiding trespass in this action.

It is of course apparent that the rule for which we contend is reciprocal, i.e. that the state Courts have the same exclusive jurisdiction when the action is commenced in the State Courts as have the Federal when commenced in the Federal Courts, *Peck vs. Jenness* directly so holds

IV.

The judgment should be reversed.

WHEELER H PECKHAM,
of Counsel for Plff in Error.

National Printing Company, 39 & 41 Ann-st., N. Y.

Supreme Court of the United States.

DECEMBER TERM, 1865.—Nos. 135 and 136.

CORNELIUS F. BUCK,
Plaintiff in Error,
vs.
HORACE N. COLBATH.

SAME *vs.* SAME.

Writs of Error to the Supreme Court of Minnesota.

BRIEF FOR DEFENDANT IN ERROR.

These constitute in effect but a single case, and will be discussed and submitted together.

Colbath, the defendant in error, brought two actions of trespass *de bonis asportates* in the State court against Buck; now plaintiff in error, on the 29th August and 2d September, 1861, respectively, for two distinct acts of alleged trespass in taking and carrying away the plaintiff's goods. There were verdicts and judgments for the plaintiff, and these judgments were affirmed by the supreme court of the State. Whereupon these writs of error were sued out and allowed under the 25th section of the judiciary act.

The pleadings in the State court were code-fashion, by "complaint," "answer," and "reply," according to the law and practice of Minnesota. But they amount to this, to

wit: that the defendant took the goods by virtue of process out of the Federal court, authorizing and requiring him to take the goods and chattels of certain persons other than the (then) plaintiff, Horace N. Colbath, who was a stranger to the proceeding in which that process issued; and that before and at the time of such taking he was notified by the said Horace that the goods were his property, and was forbidden to take the same. The answers and replies in the two suits respectively being, in No. 135 at pp. 7, 11, Record, and in No. 136 at pp. 4, 9.

The single question presented by the plaintiff on these writs of error is, whether the State court had jurisdiction of the actions. The 25th section of the judiciary act is as follows: (1 Stat., 85.)

"That a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of such their validity; or where is drawn in question the construction of any clause of the Constitution, or of a treaty or statute of, or commission held under, the United States, and the decision is against the title, right, privilege, or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute, or commission, may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error, the citation being signed by the chief justice, or judge, or chancellor of the court, rendering or passing the judgment or decree complained of, or by a justice of the Supreme Court of the United States, in the same manner and under the same regulations, and the writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a circuit court, and the proceeding upon the reversal shall also be the same, except that the Supreme Court, instead of remanding the cause for a final decision, as before provided, may, at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same, and award execution. But no other error shall be assigned or regarded as a ground of reversal in any such case, as aforesaid, than such as appears on the face of the

record, and immediately respects the before-mentioned questions of validity or construction of the said Constitution, treaties, statutes, commissions or authorities in dispute."

The question of jurisdiction was made by a prayer to the court for an instruction to the jury, which is to be found in Record 135 at p. 12, and in Record 136, at p. 10, and is as follows:

"The defendant then requested the court to charge 'that it being admitted by the pleadings that the defendant took the goods, as United States marshal for the district of Minnesota, by virtue of process issuing out of the United States district court for the district of Minnesota, the right of property in those goods cannot be tried in this court, and there must be a verdict for the defendant.

"'The court refused so to charge, and the defendant excepted.

"'And, on the contrary, the court charged the jury that such a taking would be no defense to this action unless the jury should find that the property in the goods was in Geo. C. Colbath & Co., the defendants in the process, and that that question was for them to try, to which the defendant duly excepted.'"

The pleadings referred to were, first, the answer of the defendant in which he justified the taking by virtue of process out of the Federal court, not against the goods of the plaintiff, but against the goods of other parties; and, second, the reply of the plaintiff, which is as follows:

"The plaintiff in the above entitled action, replying to the answer of the defendant therein, alleges that at the time of the taking by the defendant of the goods and chattels mentioned in said answer, the said plaintiff gave the defendant due notice that the said goods and chattels were the property of him, the said plaintiff, and forbid the defendant taking the same." (Record No. 135, p. 11; do. No. 136, p. 9.)

However untechnical these pleadings may be, they must be regarded under the law and practice of Minnesota as sufficiently presenting a single issue: Whether the goods taken were the goods which the marshal was authorized to take under that process. These pleadings did not admit that the Federal process in the hands of the marshal authorized or purported to authorize him to take the goods of Horace N. Colbath. Nor did they question or deny his authority to take the goods of the defendants therein named. On the contrary, they plainly admitted this authority, and limited

the plaintiff's complaint to the abuse and misapplication of that authority to subjects not purporting to be comprehended or affected by it. It was nothing to the purpose that the marshal did the act complained of by color of his office and of process in his hands, if that process did not purport to authorize the act. And the reply can be construed to make no larger admission.

Here was not drawn in question "the *validity* of a treaty or statute of, or an authority exercised under, the United States," nor "the *construction* of any clause of the Constitution or of a treaty or statute of, or commission held under, the United States." The Federal process was admitted to be valid in the case in which it was issued, nor can there be any question of its construction, unless process against A could by possibility be construed to be process against B, which is an absurdity. *It is, therefore, not a case within the provisions of the 25th section of the judiciary act; and the writs of error should be dismissed for want of jurisdiction.*

But, if the record presents a case of which this Court has *jurisdiction* under the 25th section, it remains to consider whether the judgment of the supreme court of Minnesota shall be *reversed or affirmed*, no other error being open to review except such as concern the very matter which gives such jurisdiction.

Now, that alleged error is the refusal of the Court to give the instruction above quoted, as prayed by the plaintiff in error. The proposition on the part of the plaintiff in error was, in substance, that inasmuch as the trespasses complained of had been committed by him *colore officii*, and in the alleged execution of process, committed to him as marshal, he could not be held to answer therefor *in damages* in a State court, however grossly, or wantonly and maliciously, he may have abused his office or misapplied his process. It amounted to a claim of exemption from personal liability for such abuse and misapplication in all courts except that which issued the process, and for all time. It necessarily admitted, *argumenti gracia*, that there had been in fact such abuse and misapplication; for the plea had simply set up that he had committed the acts complained of *as marshal*, and by virtue of process directed against persons other than the plaintiff below; and the "reply" was that before and at the time of committing them the said plaintiff had notified him of his right, and warned him of the abuse and misapplication he was about to commit.

Whether there be such exemption, is now for the first

time to be decided by this Court, and must necessarily be distinctly decided, unless these writs of error be dismissed for want of jurisdiction.

It is submitted that such exemption is neither consistent with principle, nor with sound public policy. Certainly it has never been asserted nor countenanced by this Court.

The scope and extent of the judgments of this Court upon the whole subject will be sufficiently suggested to its recollection by a reference to the following cases:

Crowell *vs.* Randall, 10 Peters, 368.
Freeman *vs.* Howe, 24 Howard, 450.
Day *vs.* Gallup, 2 Wallace, 97.

Day vs. *Gallup*, which closely resembles this case, being an action of trespass under like circumstances, was dismissed for want of jurisdiction; although the taking complained of plainly appeared to have been, upon process of execution, issued out of the Federal court, it being held that no case under the 25th section necessarily presented itself upon the record.

Crowell vs. *Randall*, in which all the authorities up to that day were reviewed, was dismissed for a like reason.

Freeman vs. *Howe* was the case of a writ of replevin issued out of the State court, by virtue of which the sheriff took certain chattels which the United States marshal had already seized upon process of the Federal court. It is difficult to imagine a case more plainly within the provisions of the 25th section, since the replevin directly obstructed the pending proceeding in the Federal court, and took from its control the very thing in controversy of which it had possession. The argument mainly relied on to support the State jurisdiction was, that the plaintiff in the replevin and the marshal were citizens of the same State, and hence that a suit between them could not be entertained by the Federal court. But to this it was answered by the Court (per Mr. Justice Nelson) that the remedy was by bill in equity, which would not be an original suit, but supplemental and ancillary to the pending suit in the Federal court.

Now, in the case at bar, the action did not at all obstruct or interfere with any proceeding in the Federal court; nor does it appear by the plea that any proceeding was then pending there. So that neither was it a case within the principle of Freeman *vs.* Howe, nor was there any suit in the Federal court to which the plaintiff below could have attached a supplemental proceeding so as to give that court jurisdiction

between him and the marshal, who were both citizens of the same State of Minnesota. Under these circumstances to reverse the judgment of the State court would be to deny all remedy whatever in the premises.

For these reasons it is submitted that, first, these writs of error should be dismissed for want of jurisdiction; or, in the alternative, secondly, that the judgments should be affirmed with costs.

J. M. CARLISLE,
Of Counsel for Defendant in Error.